Supreme Court, U.S.
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No. 98-1485

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

THE STATE OF IDAHO,

Petitioner,

v.

LORI KAY NEWSOM,

Respondent.

On Petition for Writ of Certiorari
To The Idaho Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does the search incident to arrest *bright-line rule*, established in *New York v. Belton,* authorize a warrantless search of the persons of vehicle occupants who are not arrestees?

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STATEMENT OF THE CASE

Respondent was a passenger in a motor vehicle that was stopped for a traffic infraction. The driver of the vehicle was arrested on an outstanding arrest warrant. At that time, Respondent was sitting in the passenger seat of the vehicle with her purse on her lap. An officer approached Respondent's side of the car, and asked her for identification, which she produced from her purse. That officer then asked the Respondent to exit the vehicle, and when she did, she attempted to take her purse with her. The officer ordered her to leave her purse in the car, and she complied with that request. The officer that arrested the driver of the vehicle, then searched the interior of the vehicle incident to the arrest of the driver, including the Respondent's purse which had been left in the car at the second officer's request. The first officer found a small coin purse inside the Respondent's purse, and, in turn, found methamphetamine inside the small coin purse. At the time of these events, the officers lacked probable cause to believe the Respondent and the driver of the vehicle, were engaged in criminal activity. They also lacked probable cause to believe that contraband or other evidence of criminal activity was in the vehicle.

The Respondent moved to suppress the methamphetamine found in her purse in the District Court, and the District Court denied that motion to suppress based upon *New York v. Belton*. The Respondent then appealed to the Idaho Court of Appeals, where the lower court's decision, was affirmed. The Idaho Supreme Court granted review, and reversed the Court of Appeals, holding that *Belton* did not apply. The case was remanded for further proceedings but

execution of the Court's opinion was stayed at Petitioner's request pending resolution of these proceedings.

INTRODUCTION

Petitioner seeks certiorari upon two grounds, (1) that the Idaho Supreme Court's decision in *Newsom* is not consistent with this Court's decisions in *Chimel v. California* and *New York v. Belton*, and, (2) that a split of authority exists in state courts of last resort with regard to the ruling in *Newsom*. Petitioner, in other words, is seeking review under Rule 10(b), upon the grounds that a State court of last resort has decided an important federal question in a way that conflicts with the *Belton* and *Chimel* decisions, and also that the *Newsom* decision conflicts with other state courts of last resort.

In this brief, Respondent will argue that neither of these propositions are true. The Idaho Supreme Court, in *Newsom*, has made a decision consistent with the *Belton* and *Chimel* decisions, and further, a review of the state court cases that Petitioner cites in its brief does not establish that the *Newsom* decision conflicts with decisions of other state courts of last resort.

THE IDAHO SUPREME COURT DECISION IN NEWSOM IS NOT INCONSISTENT WITH NEW YORK v. BELTON

The Idaho Supreme Court's decision in *Newsom* is not inconsistent with the *Belton* decision for the critical reasons that (a) Respondent was not an arrestee, and (b) her purse was actually a part of her person when it was seized from her and subsequently searched. Petitioner overlooks the fact that *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 2869 L.Ed.2d. 768 (1981) involves a case where all the occupants of the vehicle were arrestees. It is Respondent's contention that the bright-line rule embodied in *New York v. Belton*, does not apply to a search of non-arrestee passengers. The basis and justification for allowing the officers to search the contents of a vehicle from which an occupant has been arrested is of fundamental importance to the resolution of this case. The justification for the bright-line rule is set forth in *Belton*, at 453 U.S. at page 461:

> Such a container may, of course, be searched whether it is open or closed, since the justification is not that the arrestee has no privacy interest in the container, but the lawful custodial arrest justifies the infringement of any private interest the arrestee may have. (emphasis added).
>
> * * *
>
> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

The justification for allowing the search of containers in the vehicle is that this intrusion is minimal when considering the infringement of any privacy interests of the arrestee due to the arrest itself. Belton does not speak to the privacy interest of non-arrestees, such as the Respondent.

In this case, we are not dealing with the privacy interest of the arrestee. Instead, we are dealing with the privacy interest of a passenger in a vehicle which the arrestee was driving, and the search of the Respondent's purse, which was on her lap at the time she tried to exit the vehicle, and therefore a part of her person. The subsequent search of her purse, was, therefore, a search of her person. The bright-line rule embodied in *Belton* simply does not apply or authorize a search of non-arrestee passengers occupying the vehicle. In *U.S. v. Bell*, 762 F.2d 495 (6th Cir. 1985), the Sixth Circuit refused to extend *New York v. Belton* to the search of a passenger in a car driven by one who was arrested pursuant to a warrant. In that case, at fn. 5, the Court noted as follows:

> "The Fourth Amendment 'protects people, not places.' *Katz v. U.S.*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).
>
> "[M]ore particularly it protects people from unreasonable government intrusions into their legitimate expectations of privacy.
>
> * * *
>
> Because Bell was legitimately possessed of his own expectation of privacy, *Belton* and *Chimel* do not support the proposition that the search of the passenger compartment of an automobile authorized by *Belton* . . .

> extends to passengers in a car driven by one who is being arrested pursuant to a warrant."

Neither *Belton* nor *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1981), extend the scope of a search incident to an arrest to the search of a non-arrestee's person who may be in the immediate area. At page 6 of the Petition, Petitioner argues that Respondent's purse was a container within the passenger compartment of the automobile, therefore subject to a search incident to the arrest of the driver under Belton. However, this is a mischaracterization, since the purse at the time of the driver's arrest, was on Respondent's lap, and she attempted to take it when she exited the vehicle. The purse, at that time, was actually a part of her person, not just a container in the vehicle which was being searched. That being so, the officers cannot manipulate the purse to a status of simply being a container in the vehicle by ordering the Respondent to leave the purse in her car. This would be similar to the incidences which were not permitted in *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 622 L.Ed.2d 238, rehearing denied, 44 U.S. 1049, 62 L.Ed.2d 737, 100 S.Ct. 741 (1979), *U.S. v. DiRe*, 332 U.S. 581, 92 L.Ed. 210 (1948), and *U.S. v. Perea,* 996 F.2d 633 (2d Cir. 1963). As stated in Perea, supra, at page 643:

> "Further, arresting agents are not allowed to simulate circumstances warranting application of the incident – to – arrest exception merely by bringing the item they wish to search into the area near the person arrested, or vice versa."

The Idaho Supreme Court has not carved out an exception to the *Belton* rule, as Petitioner argues. Rather, it has

simply stated that *Belton* does not apply, since *Belton* does not authorize searches of non-arrestees.

It should be kept in mind that in this case, there was no apparent ongoing criminal activity by either the driver of the vehicle, or by the Respondent herself. The car was pulled over for failure to signal. The driver was arrested for an outstanding warrant. The search was conducted after both occupants were out of the car. The search of the vehicle could not be justified in an effort to secure evidence or any other criminal activity being perpetrated by a driver because she was stopped for not signaling and arrested on a warrant. Any concerns for officer safety, therefore, could be adequately addressed by the principals set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The Idaho Supreme Court's ruling in *Newsom* does not establish a different rule from *Belton* that would be hard to follow by officers in the field. The *Newsom* decision does not alter the rule. Under *Newsom*, the rule remains that the search-incident-to-an-arrest exception does not authorize a search of persons who are not arrestees. Any patdown or search for weapons of nearby non-arrestees, is therefore governed by the existing principals under *Terry v. Ohio* and the *Chimel* case. *Chimel* authorizes a search incident to an arrest of the lunge area of the arrestee. Again, the *Newsom* decision does nothing to alter this rule. Officers in the field will still know that they cannot search the persons of people who are not under arrest under the *Belton* case, and, if they have concern for their safety with regard to a non-arrestee, they can pat down that person, and, if justified, search the person for weapons. If probable cause develops from the pat down, the officer can arrest the

person. These principals are not altered by the *Newsom* decision.

Petitioner's anticipated reliance upon *Wyoming v. Houghton*, S.Ct. 98-184, decided April 5, 1995, is not well placed. The *Houghton* decision is an automobile exception case based upon probable cause to believe controlled substances were located in the vehicle that was searched. The rationale of this case was essentially based upon the justification for the search a motor vehicle when there is probable cause to believe that controlled substances will be found therein, set forth in *U.S. v. Ross*, 456 U.S. 798, at p. 806 (1982). However, as the Court pointed out in *Houghton*, the justification for a search of containers under the automobile exception (probable cause) is different than the justification set forth in *Belton*. The Court in *Houghton* summarized the justification for the exception to the warrant requirement in the automobile exception (citing *Ross*) as follows:

> *Ross* summarized its holding as follows: "If probable cause justifies a search of a lawfully stopped vehicle, it justifies the search of *every part of the vehicle and its contents* that may conceal the object of the search." *Id* at 825 (emphasis added).

As previously mentioned, the justification for the search incident to an arrest exception set forth in *Belton*, is different. The justification for the search in *Belton* situations, is that the infringement upon the arrestee's privacy rights are made minimal by the fact that he has been arrested himself. Thus, the *Belton* exception refers only to a permissible invasion of the arrestee's privacy rights, not those of non-arrestees. The rationale under *Ross*, when there is probable cause to believe

there are controlled substances in the vehicle, is that probable cause already exists to justify the search of a lawfully stopped vehicle and the justification extends to every part of the vehicle and its contents.

Conceivably, under *Ross*, a passenger could be ordered to leave a personal item in the car because probable cause already exists to search the entire contents of that car. However, when there is no probable cause to search the car, a search of the person of non-arrestees would not be within the scope of that search. The scope of that search appears not to include the persons of non-arrestees even if there is probable cause. The *Houghton* court distinguished between the search of containers authorized by its decision, as opposed to the search of persons by the following statement:

> "In this regard -- the degree of intrusiveness upon personal privacy and indeed even personal dignity -- the two cases the Wyoming Supreme Court found dispositive differs substantially from the package and search at issue here. *U.S. v. Di Re* 332 U.S. 58(1948), held that probable cause to search a car did not justify a body search of a passenger. And *Ybarra v. Illinois*, 444 U.S. 85(1979), held that a search warrant for a tavern and its bartender did not permit body searches of all the bar's patrons. These cases turned upon the unique, significantly heightened protection afforded against searches of one's person. 'Even a limited search of the outer clothing . . . constitutes as a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.' *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968). Such traumatic consequences are not to be

expected when the police examine an item of personal property found in the car."

Justice Breyer, in his concurring opinion, amplified upon this distinction by stating as follows:

> 'At the same time, I would point out certain limitations upon the scope of the bright-line rule that the court describes. Obviously, the rule applies only to automobile searches. Equally obviously, the rule applies only to containers found within automobiles. And it does not extend to the search of a person found in that automobile.' (emphasis added).
>
> * * *
>
> Less obviously, but in my view also important, is that the container here at issue, a woman's purse, was found at a considerable distance from its owner, who did not claim ownership until the officer discovered her identification while looking through it. Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times. So I am tempted to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both. However, given this court's prior cases, I cannot argue that the fact that the container was a purse *automatically* makes a legal difference, for the court has warned against trying to make that kind of distinction. *U.S. v. Ross, supra*, at 822. But I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of "outer clothing," *Terry v. Ohio,*

> *supra*, at 24, which under the court's cases, would properly receive increased protection. . . . In this case, the purse was separate from the person, and no one has claimed that, under those circumstances, the type of container makes a difference. (emphasis added).

Respondent submits that the critical distinction in this case is the fact that Respondent's purse, being on her lap at the time of the arrest, and being removed from her person only at the direction of the police officer, was a part of her person at the time of its search. The purse, being a part of a non-arrestee's person, does not, therefore, come within the scope of a search incident to an arrest under the *Belton* bright-line rule. Since there was no probable cause to search the vehicle, it does not, therefore, come within the bright-line rule of *Wyoming v. Houghton*, *supra*, or *U.S. v. Ross, supra*.

THE IDAHO SUPREME COURT HAS NOT DECIDED AN IMPORTANT FEDERAL QUESTION THAT CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS.

The second reason Petitioner urges this Court for a writ of certiorari is that a split exists in the lower courts as to whether a container belonging to someone other than the arrestee is subject to a search under *Belton's* bright-line rule. Interestingly, the Idaho Court of Appeals, which sided with petitioner, but was reversed by the Idaho Supreme Court, held that "the vast majority of cases hold that all containers, including those of non-arrestees, are subject to search." Appendix to Petition for Writ of Certiorari, p. 13. Respondent submits that an analysis of the cases cited by Petitioner in

support of this split of authority, reveals that the cases do not establish that the Idaho Supreme Court has decided an important federal question in a way that conflicts with decisions of other state courts of last resort.

A number of the cases cited by Petitioner are distinguishable in that they did not involve a situation where a non-arrestee occupant of the vehicle had the personal property on his person before being told to leave the property in the vehicle. In *People v. Mitchell*, 42 Cal.Rptr. 537, 539 (Cal.App. 1995), the Court, for its authority, relied on pure dicta set forth in *U.S. v. Vaughn*, 718 F.2d 332 (9th Cir. 1993). This is pointed out concisely in the dissenting opinion of Justice White in *People v. Prance*, 226 Cal.App.3d 1525, 227 Cal.Rptr., at p.573 (Cal.Ct.App. 1991). In *People v. McMillan*, 892 P.2d 879 (Colo. 1995), the Appellant in that case left her purse "voluntarily" in the car. *State v. Moore*, 619 So.2d 376 (Fla.Dist.Ct.App. 1993) does not indicate whether or not the defendant was told to leave the purse in the car. And, *Staten v. U.S.*, 526 Atl.2d 90 (D.C. 1989) is distinguishable because it involves a search of the glove box of the vehicle, which was owned by a non-arrestee occupant of the car at the time the driver was arrested. These cases are not inconsistent with the *Newsom* decision, because none of them specifically involved the search of a non-arrestee's purse that was in her possession at the time another occupant of the vehicle was arrested.

State v. Loftis, 568 So.2d 121 (Fla.App. 5 Dist., 1990) does not specifically indicate whether the purse that was searched incident to the arrest of the driver of the automobile was in the possession of the passenger at the time of the arrest. In fact, the court indicated that the purse was located on the

front floorboard on the passenger side of the vehicle at the time, and was within the driver-arrestee's immediate control.

In *State v. Anders*, 497 So.2d 290 (Fla.App. 1981), Anders was asked out of the car after the driver was arrested for a DUI. The driver was wearing a black gun holster with a knife in it when he was arrested, creating concern on the part of the officers that there possibly could be a weapon in the vehicle. Anders' purse was found under the floor mat on the passenger side of the vehicle when it was searched incident to the driver's arrest. There is no indication that the purse was in Anders' possession.

In *U.S. v. Mitchell*, 82 F.3d 146 (7th Cir. 1996), a gun was found in a cardboard box between the two front seats after both Mitchell and the other occupant were arrested. The search in this case was upheld for the primary reason that Mitchell consented twice to the search of his van. In pure dicta, the Court proffered an alternate theory justifying the seizure of the gun, that is, that it would be valid based upon the search incident to the arrest of the passenger. The rule in this case is not inconsistent with *Belton*, nor is it at odds with the rule announced in the *Newsom* decision.

In *People v. Bullock*, 45 N.W.2d 866 (Mich. 1992), all three occupants of the vehicle, including Bullock, were arrested. Because the driver's arrest, at least, was unquestionably valid, they upheld the search resulting in the seizure of Bullock's purse, as valid incident to the arrest of the driver. However, it should be noted that again, the purse was not in Bullock's possession, but was found in the glove box of the vehicle. In this case, Bullock was an arrestee, although the validity of her arrest was not decided. Significantly, the purse

that was seized incident to the arrest of the driver, was not in her possession at the time. This case, therefore, does not involve the search of a person of a non-arrestee, and is therefore not inconsistent with *Belton*, and is distinguishable from the *Newsom* decision.

In *Vega v. State*, 512 S.E.2d 65 (Ct.App. GA. 1999), W.L. 55495, the search of Vega's gym bag found in the vehicle incident to the arrest of the driver, was upheld under *Belton* as a search incident to the arrest of the driver. Vega was not an arrestee, however, the black gym bag was located in the car's rear passenger seat, and there is no indication that it was in Vega's possession at the time the driver was arrested.

State v. Hamdia, 400 N.W.2d 485 (Wis. App. 1986) is distinguishable because Hamdia exited the automobile at an officer's request and then left the scene on foot. He later arrived at the police station to post bond for the driver. After Hamdia left the scene, the police searched the automobile and found weapons and a controlled substance. There is no indication where these items were found in the automobile or whether they were in Hamdia's possession before he exited the vehicle.

Finally, Petitioner cites several cases from the State of Washington in support of its proposition that there is a split of authority on this issue. The first case is *State v. Nelson*, 948 P.2d 1314 (Wash.Ct.App. 1997). This case is indistinguishable from the *Newsom* decision, and not inconsistent with *Belton*. In that case, Nelson, after one of the passengers was arrested, was ordered by an officer to get out of the truck and also ordered to leave her purse, which was between her legs at the

time. Nelson was a non-arrestee. The Washington Court of Appeals stated at 948 P.2d p.1316:

> "Thus, if the police do not believe a person presents a danger, they cannot search the person and their clothing. This would include a purse that they are carrying."

This case, as the *Newsom* decision, is outside of the scope of *Belton*, because it involves a non-arrestee and her person was searched. Both *Nelson* and *Newsom* are consistent with each other and not in conflict with *Belton*.

The other two Washington cases cited by Petitioner, do not assist Petitioner's cause. These cases are *State v. Parker*, 944 P.2d 1081 (Wash.App.Div. 3, 1997) and *State v. Hunnel*, 949 P.2d 847 (Wash.App.Div. 2, 1998). Petitioner submits that the *Parker* case is consistent with *Newsom*, because the defendant in that case voluntarily exited her car to take a breath test, and left her purse in the car. There was no evidence that the purse was on her person at the time she was asked to exit the vehicle, or that she attempted to remove it from the vehicle. *State v. Hunnel*, the respondent concedes is inconsistent with the *Newsom* decision. However, both of these cases are not decisions by a state court of last resort, since they are both on review to the Washington Supreme Court, as indicated by Petitioner in footnote 2 of the Petition. (Oral argument was heard on September 23, 1998.) In a telephone call to the Clerk of the Washington State Supreme Court on May 4, 1999, counsel for Respondent was informed that this case is still under advisement. None of the Washington cases cited by Petitioner, therefore, supports his proposition as to a split of authority.

CONCLUSION

The Idaho Supreme Court's decision in *Newsom* is not inconsistent with the U.S. Supreme Court's decisions in *Chimel* and *Belton*. Neither of these cases hold that the person of a non-arrestee may be searched incident to the arrest of another occupant of a motor vehicle. The cases that Petitioner cites do not establish that there is a split of authority among state courts of last resort on an important federal question. This case does not involve an important federal question or a decision that in any way conflicts with the decisions of the United States Supreme Court, nor with decisions of courts of last resorts of other states. The Petition for Writ of Certiorari should be denied.

DATED May 6, 1999.

Respectfully submittted,

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